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IN THE COURT OF APPEALS OF INDIANA

DENNIS KILGORE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A05-0607-CR-355
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Randall Johnson, Judge
Cause No. 27D02-0503-FA-38

April 18, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Appellant-Defendant Dennis Kilgore ("Kilgore") appeals his sentence, following a hearing in Grant Superior Court where he pleaded guilty to Class B felony child molesting. Concluding that the trial court properly sentenced Kilgore, we affirm.

Facts and Procedural History

On November 29, 2004, Kilgore and his wife babysat their five-year-old niece. While Kilgore's wife was away from the house on an errand, Kilgore licked the child's vagina. He also inserted his finger into her vagina and showed her pictures of naked children.

On March 28, 2005, following a police investigation and properly executed search of Kilgore's home, the State charged Kilgore with two counts of Class A felony child molesting, Class D felony possession of child pornography, Class A misdemeanor possession of marijuana and Class A misdemeanor possession of paraphernalia. On May 1, 2006, Kilgore entered into a plea agreement with the State by which Kilgore agreed to plead guilty to one amended count of child molesting as a Class B felony, and the State agreed to dismiss all the remaining charges. By the terms of the agreement, the trial court would determine the sentence it would impose.

At the sentencing hearing held on June 5, 2006, Kilgore indicated that the pre-sentence investigation report required no corrections or additions and the trial court conditionally accepted his plea. Tr. p. 23. Kilgore subsequently apologized to the victim, who was not present, and admitted that he knew it was wrong to molest her. Through counsel, Kilgore also admitted that at the time of the molestation, he was in a position of trust with the victim. Kilgore argued several mitigating circumstances existed

as well, including the fact that the misconduct only occurred once, that he had admitted his guilt, and that by pleading guilty, he saved the victim from testifying at trial and saved the State the time and expense of a trial. Ultimately, Kilgore requested that the trial court follow the pre-sentence investigation report recommendation for a twelve-year sentence, with eight years executed and four years suspended to probation.

In sentencing Kilgore to the maximum Class B felony sentence, the trial court made the following pertinent statements:

> I'll go right to, uh, some troubling areas that I found involving this defendant. First is the criminal history. It's not lengthy, as [defense counsel] correctly said . . . but it is significant in that the burglary in 1991, as an adult, uh defendant received, uh, in Louisiana, six years in prison . . . then he had two parole violations . . . based on that same criminal charge, burglary. Um, operating never licensed is of no significance to me at this point in time, nor is the, uh, reckless driving . . . particularly troubling . . . . But the, uh, burglary of the past, and the two parole violations, I do find to be moderate aggravators, and, uh, more concerning to me is the position of care, custody, and control of the victim . . . [a] violation of a position of trust . . . the victim was a niece of [Kilgore's] wife . . . the victim was in the care of the defendant and his wife. She, the, uh, child's mother's sister was babysitting this child, five years old at the time, and that to me is a major aggravator, a very strong aggravator. Uh, no mitigators were found in the Presentence Report. [Defense Counsel] raises several issues, and he says, while they're not statutory mitigators, he wanted the Court to take a look at them. [Defense Counsel], I'll ask you to tell me if I missed anything. I tried to take good notes of what you were saying. Uh, you said this is not a multiple, multiple type of situation, it was a one-time-only . . . but I don't find any weight as a mitigator in that, um, cases of this type are done in secrecy, and . . . it's not unusual to not find much evidence of anything other than what we have in front of us. I don't find any mitigation to that issue at all. The defendant admitted guilt, and, uh, didn't put the Court and the victim through the Court process, but, uh, in trying to decide if that gives any mitigation to what he did, I, I'm offset by the possibility, and in fact the probability that he got rid of two A Felonies by taking this B Felony, and the victims stated why . . . they didn't want to go through it. I don't find his admission of guilt to be a mitigator either. Uh, defendant's wife and he are divorced. I heard two different versions of that. He may be divorced, he may not be, I don't know if he is or he is not, and I don't find

any particular mitigation in that issue. Uh, that's simply a consequence of what had happened here, not entitled to any mitigation weight. Kids are resilient and I'm very glad to hear that this child isn't suffering as badly as she could be, but the defendant did absolutely nothing to create her progress. And in fact, he did just the opposite. [Defense Counsel] said it correctly, she is probably going to be affected, uh, perhaps the rest of her life. I hope not, but perhaps. But again, the defendant didn't do anything to mitigate the child's circumstances, and the fact that she may have finally passed kindergarten, when she didn't pass kindergarten last year. It's not a mitigator. Um, there are several other things in the Presentence Report that I want to touch on. The substance abuse of the defendant, which is set forth in the report, and which the defendant did not find anything inaccurate to those allegations of the substance abuse. Um, alcohol is a big part of his life, especially in the time he spent on the street, um, marijuana smoking since seventeen, daily smoker, a greedy smoker, in his own words. I don't know what that quite means. Spend anywhere between fifty and a hundred dollars a week to obtain the substance. There were times he felt he could not get going without one in the morning. Uh, used crystal meth two or three years ago. Uh, he liked the substance, had a hard time finding it. On the day of the present offense, the defendant stated he was under the influence of alcohol and Zanex, which he reported using on a regular basis. Substances obviously have contributed to his circumstance, and may again in the future. [Defense Counsel] referenced, towards the end . . . the defendant's cooperation as to that [pre-sentence investigation] interview. The defendant expressed progression he experienced from visiting chat rooms and looking at free regular porn on the internet, seeking out child porn, and committing the present offense. He could not explain why that was happening, but he knew it was not right. He described himself as having a sickness, and estimated he was seeking out pornography on the internet four to five hours a day. The defendant talked about how this offense affected him and his life, when he was asked about how it could affect the victim, he stated . . . it would mess them up. He added that, uh, he hopes it's something that will not affect her long term. I assume he's talking about the victim. When questioned by the police department, the defendant was asked about what should happen to somebody who touches a child inappropriately. His response was, and I'm quoting him, I think they should have their d[---] chopped off and their head cut off. He was also asked if he thought they should get a second chance under any circumstances. His response was, nope . . . . Later the defendant softened his estimate of what should happen to people in his circumstance and said he was intimidated and freaking out when he made those comments. Now he feels that everyone should be punished for their crimes, but not to the extent that he had previously stated. I do accept his plea agreement based on the fact that the parents of the victim didn't want to put this child, nor

> did the State want to put this child through the turmoil and uncertainties of a trial, and relive, by testifying, uh, the events that transpired. So for that reason, and that reason alone, I accept the plea agreement. . . . Dennis R. Kilgore, I sentence you to twenty years in prison. You will register as a sex offender when you're out. Stay away from that victim.

Tr. pp. 48-53. This appeal ensued.

Discussion and Decision

Kilgore asserts on appeal that the trial court inappropriately sentenced him to the maximum sentence allowed for a Class B felony. Specifically, Kilgore argues that the trial court erred when it failed to give "adequate consideration to the mitigating circumstances put forth by [Kilgore]" and that it "should have suspended five (5) years of [Kilgore's] sentence to allow him to receive [sex offender] treatment during a term of probation." Br. of Appellant at 16. We disagree.

Under Article VII, Section 6 of the Indiana Constitution, this court has the constitutional authority to review and revise sentences. Smith v. State, 839 N.E.2d 780, 787 (Ind. Ct. App. 2005); see also Indiana R. App. P. 7(A) & (B). However, trial courts are granted broad discretion in imposing sentences, including the consideration of aggravating and mitigating circumstances, and we will reverse a sentencing decision only for an abuse of that discretion. Glass v. State, 801 N.E.2d 204, 207 (Ind. Ct. App. 2004). When enhancing a sentence, the trial court must set forth a statement of its reasons for selecting a particular punishment. Id. Specifically, the court must (1) identify all significant aggravating and mitigating circumstances, (2) explain why each circumstance is considered aggravating and mitigating, and (3) show that it evaluated and balanced the

circumstances. Id. If a sentence other than the presumptive[1] is imposed, the record must reflect those factors the court considered in either enhancing or reducing the sentence. Sensback v. State, 720 N.E.2d 1160, 1163 (Ind. 1999). While the court should consider all proffered mitigating circumstances, it need state for the record only those that the court finds significant. Id. A trial court may enhance a sentence based upon the finding of a single valid aggravating circumstance. Ketchem v. State, 858 N.E.2d 255, 255 (Ind. Ct. App. 2006). Finally, our review is not limited to the written sentencing order; we are required to look at the entire record, including the sentencing hearing. Davies v. State, 758 N.E.2d 981, 986 (Ind. Ct. App. 2001).

The presumptive sentence for the class of crimes to which the offense belongs is meant to be the starting point for the court's consideration of what sentence is appropriate for the crime committed. Id. Here, Kilgore pleaded guilty to Class B felony child molesting. See Ind. Code § 35-42-4-3(a) (2004). "A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances." Ind. Code § 35-50-2-5 (2004). Hence, Kilgore's twenty-year executed sentence is the maximum lawful sentence allowed for his conviction. Although maximum lawful sentences have "historically invoked appellate review and, upon occasion, revision[,]" Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003),

[1] After the date of Kilgore's offense, Indiana Code section 35-50-2-5 (2004 & Supp. 2006) was amended to provide for "advisory" sentences rather than "presumptive" sentences. See P.L. 71-2005, § 8 (eff. Apr. 25, 2005). This Court has previously held that the change from presumptive to advisory sentences should not be applied retroactively. See Walsman v. State, 855 N.E.2d 645, 650-51 (Ind. Ct. App. 2006); Weaver v. State, 845 N.E.2d 1066 (Ind. Ct. App. 2006), trans. denied; Ketchum v. State, 858 N.E.2d 255, 255 n.6 (Ind. Ct. App. 2006). Therefore, we operate under the earlier "presumptive" sentencing scheme when addressing Ketchum's sentence.

considering the nature of the offense and the character of the offender, this is not a case that calls for revision.

Kilgore contends that the trial court should have given substantial weight to his guilty plea and to his cooperation during the pre-sentence investigation interview as mitigating circumstances. A court may impose any sentence that is authorized by statute and permissible under the Constitution of the State of Indiana regardless of the presence or absence of aggravating or mitigating circumstances. Ind. Code § 35-38-1-7.1(d) (2004 & Supp. 2006). Finding the existence of mitigating circumstances is within the trial court's discretion. Glass, 801 N.E.2d at 208. The trial court is not obligated to credit or weigh a possible mitigating circumstance as defendant suggests it should be credited or weighed. Sensback, 720 N.E.2d at 1163. Moreover, "[a] guilty plea is not automatically a significant mitigating factor." Mull v. State, 770 N.E.2d 308, 314 (Ind. 2002).

Kilgore was originally charged with five counts as follows: Count 1, Class A felony child molesting; Count 2, Class A felony child molesting; Count 3, Class D felony possession of child pornography; Count 4, Class A misdemeanor possession of marijuana; and Count 5, Class A misdemeanor possession of paraphernalia. Appellant's App. pp. 8-10. Yet, Kilgore only pleaded guilty to one reduced count of Class B felony child molesting, while the State dismissed the remaining four charges. Additionally, the record reveals that Kilgore was charged with all five counts on March 28, 2005, but did not enter his guilty plea until May 1, 2006. Thus, any benefit to the State resulting from the plea pertaining to saved time and money was greatly diminished because the State

"was preparing for trial, with all the activity and investigation trial preparation entails, for approximately fourteen months prior to entry of the plea." Br. of Appellee at 5.

Based on the foregoing, we conclude that Kilgore received benefits for his plea that were more than adequate to permit the trial court to conclude that his plea did not constitute a significant mitigating factor. See Sensback, 720 N.E.2d at 1165 (concluding that defendant received benefits for her plea adequate to permit the trial court to conclude that her plea did not constitute a significant mitigating factor where defendant pleaded guilty to felony murder and in exchange the State dropped robbery and auto theft charges); see also Glass, 801 N.E.2d at 208-09 (concluding that defendant's guilty plea to one Class B felony may have simply been a pragmatic decision and therefore not a significant mitigating factor where in return for the defendant's plea, the State dismissed the remaining counts against him, including two Class A felonies). The same might be said of Kilgore's cooperation during the pre-sentence investigation interview. We find no abuse of discretion here.

We are also not persuaded by Kilgore's further assertions that the trial court should have accorded more weight to his proffered non-statutory mitigating factors that: (1) the victim was doing better; (2) the current offense was "an isolated incident, not a long-term molestation[,]" see Br. of Appellant at 13; and, (3) Kilgore was divorced and planning to move back to Louisiana. In considering Kilgore's suggestion that the victim's improved condition should have a mitigating effect on his sentence, the trial court stated, "Kids are resilient and I'm very glad to hear this child isn't suffering as badly as she could be, but the defendant did absolutely nothing to create her progress.

And in fact, he did just the opposite." Tr. p. 50. This statement is supported by the evidence.

Additionally, while the trial court considered Kilgore's unsupported assertion that the current offense was an isolated incident, it ultimately rejected this proposed mitigator stating, "I don't find any weight as a mitigator in that, um, cases of this type are done in secrecy, and . . . it's not unusual to not find much evidence of anything other than what we have in front of us. I don't find any mitigation to that issue at all." Id. at 49. The trial court likewise considered and rejected Kilgore's argument that the fact he was divorced and planning to return to Louisiana after being released from jail was a mitigating factor stating, "I heard two different versions of that. [Kilgore] may be divorced, he may not be, I don't know if he is or he is not, and I don't find any particular mitigation in that issue. Uh, that's simply a consequence of what had happened here . . . ." Id. at 50.

As stated earlier, while it is well within the discretion of the trial court to determine whether mitigating circumstances exist, the trial court is not obligated to accept the defendant's assertions as to what constitutes a mitigating circumstance. Shields v. State, 699 N.E.2d 636, 639 (Ind. 1998). The trial court's statements at the sentencing hearing set forth herein clearly demonstrate that the trial court properly engaged in the requisite evaluative process by considering and balancing all the statutory and non-statutory aggravating and mitigating circumstances in this case prior to sentencing Kilgore. We therefore find no abuse of discretion. See Davies, 758 N.E.2d at 987 (stating that a trial court is not required to give the same weight to a mitigator as

would the defendant and that a trial court need not consider a mitigator that is highly disputable in nature, weight or significance).

Kilgore's final assertion that the trial court abused its discretion in failing to suspend five years of his sentence to allow him to receive sex offender treatment during a term of probation must also fail. The authority to fix a sentence within statutorily prescribed parameters is a discretionary power vested in the trial court. Jones v. State, 789 N.E.2d 1008, 1010 (Ind. Ct. App. 2003), trans. denied. This sentencing authority includes the statutory discretion to suspend a sentence and to order probation and establish its terms. Taylor v. State, 820 N.E.2d 756, 760 (Ind. Ct. App. 2005). Probation is a matter of grace and a conditional liberty that is a favor, not a right. Id. Ultimately, the decision whether to grant probation and to determine the conditions of probation are matters within the sound discretion of the trial court. Id. Thus, contrary to Kilgore's argument on appeal, it was well within the trial court's discretion to order Kilgore to serve his statutorily authorized sentence of twenty years in its entirety, and we will not impose a duty to do otherwise where none exists. See Taylor, 820 N.E.2d at 759 (stating that the authority to fix a sentence within statutorily prescribed parameters is a discretionary power vested in the trial court).

In sum, the record reveals that the trial court properly considered the significant aggravating and mitigating circumstances, and ultimately sentenced Kilgore to the maximum sentence of twenty years upon his guilty plea. In so doing, the trial court cited Kilgore's criminal history as a moderate aggravating circumstance and the fact that Kilgore violated a position of trust when he molested his five-year-old niece as a "major"

aggravator. Tr. p. 49. A single aggravating factor is sufficient to sustain an enhanced sentence. Davies, 758 N.E.2d at 986. Moreover, we have previously held that abusing a position of trust can be a valid aggravating circumstance. See Plummer v. State, 851 N.E.2d 387, 389 (Ind. Ct. App. 2006); see also Thomas v. State, 840 N.E.2d 893, 903 (Ind. Ct. App. 2006). Accordingly, we find no error.

Affirmed.

NAJAM, J., and MAY, J., concur.